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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1572

REVERE COPPER AND BRASS INCORPORATED,
Petitioner,

v.

OVERSEAS PRIVATE INVESTMENT CORPORATION,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

The questions stated by the Petitioner should be combined and restated as follows:

1. Should an arbitration award that is issued pursuant to an agreement for final and binding arbitration, and governed by the Federal Arbitration Act, be vacated or modified on "public policy" grounds where the losing party claims that the arbitrators misconstrued a contract by failing to apply a rule of contract construction (*contra proferentem)* that ambiguities in insurance contracts should be resolved in favor of the insured?

Since the arbitrators in this case did not find that the contract was ambiguous, and neither of the lower courts found that the arbitrators had erred in their con-

struction of the contract, the following *initial* question also is presented:

2. Did the arbitrators in this case misconstrue the contract?

STATEMENT OF THE CASE

Petitioner asks the Court to reverse the decision of the lower courts and to modify or vacate an arbitration award in a contract dispute between the Petitioner, Revere Copper and Brass Incorporated ("Revere"), and the Respondent, Overseas Private Investment Corporation ("OPIC").

OPIC is an agency of the United States Government created by statute to administer a government program offering American investors insurance against specified political risks, including expropriation.[1] Revere obtained a contract from OPIC insuring an equity investment in its subsidiary, Revere Jamaica Alumina, Ltd. ("RJA"), against expropriation. The contract provided that all disputes would be resolved by "final and binding" arbitration under the Commercial Arbitration Rules of the American Arbitration Association (2a).[2]

A disputed claim arose and Revere demanded arbitration. After extensive evidentiary hearings, briefing, and oral argument, three neutral arbitrators issued a 123

[1] OPIC is represented by private counsel pursuant to express statutory authorization. 22 U.S.C. § 2199(d).

[2] References to ___a are to pages in the Appendix to the Petition. The arbitration provision was included in the contract pursuant to the Foreign Assistance Act of 1969, which provides that "Claims arising as a result of insurance . . . under . . . this [title] . . . may be arbitrated with the consent of the parties, on such terms and conditions as the Corporation [OPIC] may determine." 22 U.S.C. § 2197(i).

page award (26a-134a). A majority, G. Winthrop Haight, Esquire, and Carroll R. Wetzel, Esquire, held that OPIC was liable and awarded $1,131,144 to Revere. The third neutral arbitrator, Judge Francis Bergan,[3] wrote a dissenting opinion, arguing that OPIC was not liable and that Revere should be awarded nothing.

The legal proceedings that have followed result from Revere's dissatisfaction with the majority's findings that RJA was a commercial failure prior to any alleged expropriatory action and that RJA's huge commercial losses could not be included in the compensation paid for expropriation. Revere argued that under principles of consolidated accounting it was permissible not to recognize all of RJA's commercial losses, and that on a consolidated basis RJA had a "book value" of $64,131,000. The arbitrators rejected Revere's arguments and agreed with OPIC that the contract required that RJA be accounted for as a separate entity, not as a part of a consolidated group with its parent corporation and other subsidiaries and divisions, and that, when properly computed on a separate entity basis, Revere's maximum loss from expropriation was $1,131,144—the amount awarded. In reaching this conclusion, the arbitrators relied in part on the fact that the contract stated that compensation ("Net Investment")[4] was to be determined in accordance with the standards of accounting required by Section 482 of the Internal Revenue Code and that the fundamental standard required by Section 482 is that

[3] Judge Bergan retired from the New York Court of Appeals in 1973.

[4] The contract provided that compensation was to be Revere's "Net Investment" in RJA as of the date of expropriation, and that "Net Investment" was to be determined by a contractual formula, which required that the original amount of the insured investment be reduced to reflect subsequent losses of RJA (132a-133a).

of "an uncontrolled taxpayer dealing at arm's length with another uncontrolled taxpayer" (Award at 86a). They also found that the conclusion that RJA must be accounted for on a separate entity basis was supported by the fact that OPIC's contractual subrogation rights extended only to the shares of RJA as a separate entity, and not to the consolidated group (Award at 87a). In addition, the arbitrators found that Revere's proffered construction of the contract would produce an anomalous and unjust result, because "OPIC would . . . be required to pay an amount in excess of the reasonable value of what Revere claims to have lost as a result of Expropriatory Action" (Award at 90a).

Revere filed a motion under the Federal Arbitration Act, asking the District Court to "modify" or "vacate in part" the award. Revere did not question the impartiality of the arbitrators or the fairness of the proceedings; but it disagreed with their interpretation of the contract—arguing that they "rewrote" the contract and violated "public policy" by failing to construe alleged ambiguities against the insurer, OPIC. The District Court denied Revere's motion, stating that:

> Revere's claims amount to no more than the contention that the arbitrators misconstrued the contract . . . [which] "is not open to judicial review. *Bernhardt* v. *Polygraphic Co. of America, Inc.*, 350 U.S. 198, 203 n.4 (1956)."

With respect to Revere's argument that the arbitrators had violated the rule of *contra proferentem,* the District Court noted, first, that "it is not at all clear that this rule of construction has been violated" and, second, that failure to apply *contra proferentem* would not be a ground for vacating an arbitration award (11a).

The Court of Appeals affirmed, stating that even "a cursory reading of the award indicates that it 'draws

its essence' from the Revere-OPIC contract. *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)." (7a), and that there was no basis for holding that a failure to apply the rule of *contra proferentem* would be sufficient cause for upsetting an award (6a). The court rejected Revere's argument that the award should be vacated because the arbitrators' alleged failure to apply *contra proferentem* violated "public policy," explaining that there was no general "public policy" exception which permitted losing parties to challenge an arbitration award whenever they were able to find some generally accepted principle of contract construction which was transgressed by the award (4a-5a).[5]

ARGUMENT

1. The Decisions Of The Lower Courts Are Based Firmly On Prior Supreme Court Decisions.

In *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960), this Court held that an arbitrator's award must be sustained so long as it "draws its essence" from the contract. Under this "essence" test, an award must be sustained

[5] The Court of Appeals also rejected several other arguments that are not included in the "Questions Presented" by the petitioner. It found no merit to Revere's argument that a more rigorous scope of review should apply to arbitration awards under insurance contracts, because the Federal Arbitration Act, which delineates the scope of review, applies equally to all commercial contracts containing binding arbitration clauses (5a). It also gave no credence to Revere's argument that it "was compelled to accept the arbitration provision in its contract with OPIC," and, therefore, should be entitled to a different scope of review—noting that Revere was the party that had requested the arbitration and that Revere's present contention "appears to have surfaced after the arbitration award was announced" (7a).

if it is based upon an arbitrator's honest interpretation of a contract, even though a court might interpret the contract differently. In reversing the Court of Appeals' decision in the *Enterprise Wheel* case, *supra*, this Court stated:

> The Court of Appeals' opinion refusing to enforce the reinstatement and back pay portions of the award was not based upon any finding that the arbitrator did not premise his award on his construction of the contract. It merely disagreed with the arbitrator's construction of it. (363 U.S. at 598).

And, this Court went on to explain:

> Respondent's major argument seems to be that by applying correct principles of law to the interpretation of the collective bargaining agreement it can be determined that the agreement did not so provide [for the result reached by the arbitrator], and that therefore the arbitrator's dedcision was not based upon the contract. The acceptance of this view would require courts, even under the standard arbitration clause, to review the merits of every construction of the contract. This plenary review by a court of the merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final. . . . *[S]o far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.* (363 U.S. 593, 598-599; Emphasis supplied).

The same rule has been stated by this Court in commercial arbitration cases. *See, e.g., Bernhardt* v. *Polygraphic Co. of America, Inc.*, 350 U.S. 198, 203, n.4 (1956) ("Whether the arbitrators misconstrued a contract is not open to judicial review."); *Commonwealth Coatings Corp.* v. *Continential Casualty Co.*, 393 U.S. 145, 148-149 (1968) (". . . [arbitrators] have completely

free rein to decide the law as well as the facts and are not subject to appellate review.").

The decisions of the lower courts in this case are based squarely on, and dictated by, these previous decisions of this Court. The argument that an award should be vacated if the arbitrators did not apply "correct principles of law to the interpretation of the [contract]"—*e.g.* the rule of *contra proferentem*—was specifically addressed and rejected in the *Enterprise Wheel* case, *supra*. Revere's "public policy" argument does not alter the basic issue. It would require the courts to review the merits of an arbitrator's construction of a contract to determine if any rules of construction based on "public policy" had been improperly applied. Since all rules of contract construction embody some "public policy," acceptance of Revere's argument would swallow up the basic rule that an arbitrator's construction of a contract is not reviewable. Moreover, Revere's argument overlooks the fact that the Federal Arbitration Act embodies an overriding "public policy"—that arbitration is a substitute for litigation, and that an arbitration award therefore should be enforced even if the arbitrators have not construed a contract in the same way that a court might construe it.

2. The Decision Of The Court Of Appeals Is Entirely Consistent With The Decisions In Other Circuits.

Petitioner has not suggested that the decision of the Court of Appeals in this case conflicts with any decision in any other circuit. On the contrary, other circuits have followed the rule that an arbitrator's construction of a

contract is not subject to judicial review,[6] and the Court of Appeals for the Second Circuit has previously held, in *Amicizia Societa Navegazione* v. *Chilean Nitrate & Iodine Sales Corp.*, 274 F.2d 805 (2d Cir.), *cert. denied,* 363 U.S. 843 (1960), that the question of whether to apply *contra proferentem* is "within the province of arbitration," (274 F.2d at 809) and that an arbitrator's misapplication of such rules of contract construction "does not rise to the stature of 'manifest disregard' of law." (274 F.2d at 808).

3. No Important Or Unresolved Statutory Issues Are Presented.

Revere argues that the Court of Appeals' statement that there is a strong public policy favoring voluntary commercial arbitration[7] is in conflict with the statement in *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967), that, in enacting the Federal Arbitration Act, Congress intended "to make arbitration agreements as enforceable as other contracts, but

[6] *See, e.g.*, Nat'l R.R. Passenger Corp. v. Chesapeake and Ohio Ry. Co., 551 F.2d 136, 142 (7th Cir. 1977) ("The courts are in agreement that arbitrators do not exceed their powers by misconstruing a contract"); I/S Stavborg v. Nat'l Metal Converters, Inc., 500 F.2d 424, 432 (2d Cir. 1974) ("Whatever arbitrators' mistakes of law may be corrected, simple misinterpretations of contracts do not appear to be one of them."); San Francisco-Oakland Newspaper Guild v. Tribune Publishing Co., 407 F.2d 1327, 1327-1328 (9th Cir. 1969) (". . .the courts have no business overruling [an arbitrator] because their interpretation of the contract is different.").

[7] The statement of the Court of Appeals is similar to the statement of this Court in Wilko v. Swan, 346 U.S. 427, 431 (1953): "The United States Arbitration Act establishes by statute the desirability of arbitration as an alternative to the complications of litigation."

not more so" (Petition at 13).[8] This argument attempts to confuse the question of the enforceability of an agreement to arbitrate with the different question of the scope of review of an arbitration award. The statement in the *Prima Paint* case, *supra,* is based on Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2 (reproduced at 12a), which provides that an agreement to arbitrate is valid and enforceable, "save upon such grounds as exist at law or in equity for the revocation of any contract." Revere's petition does not present any issue relating to the enforceability of an agreement to arbitrate.[9] It only raises issues regarding the reviewability of an arbitrator's award once an agreement to arbitrate has been carried out and the dispute has been arbitrated. On this point the Federal Arbitration Act clearly reflects a strong public policy favoring the enforcement of an arbitration award. It does not permit review of an arbitrator's interpretation of a contract, but provides that an award can be vacated or modified only on the narrow grounds expressly listed in Sections 10 and 11 of the

[8] Revere also points to the Supreme Court's statement in Scherk v. Alberto-Culver Co., 417 U.S. 506, 510-511 (1974), that the Arbitration Act was designed to put arbitration agreements on the same footing as other contracts (Petition at 14).

[9] Revere itself initiated the arbitration in this case and did not seek to avoid its agreement to arbitrate. If a party wishes to challenge its agreement to arbitrate it can seek a declaratory judgment that such agreement is not binding. Alternatively, it may sue in court and, if the other party moves to stay the court action based on the agreement to arbitrate, see 9 U.S.C. § 3, it may advance any contentions it has to oppose the stay. *See, e.g.*, Hellenic Lines, Ltd. v. Louis Dreyfus Corp., 372 F.2d 753 (2d. Cir. 1967); Bigge Crane and Rigging Co. v. Docutel Corp., 371 F. Supp. 240 (E.D.N.Y. 1973). However, a party may not submit a dispute to arbitration, thereby reaffirming the authority of the arbitrators, and later challenge its obligation to arbitrate. Boston and Maine Corp. v. Illinois Central R.R. Co., 274 F. Supp. 257, 260 (S.D.N.Y. 1967), *aff'd,* 396 F.2d 425 (2d Cir. 1968).

Act, none of which are applicable in the present case.[10]

Revere also argues that the Court of Appeals "commingled the Labor Act and the Arbitration Act" and improperly equated the scope of review of labor arbitration awards under the Labor-Management Relations Act with the scope of review of commercial arbitration awards under the Federal Arbitration Act (Petition at 19). The Court of Appeals did not "commingle" the two acts and this case does not present any issue regarding the differences, if any, in the scope of review under those two acts. Revere argued below that a prior statement by the United States District Court for the District of Columbia, to the effect that a court may refuse to enforce an arbitration award if it "compels the violation of law or conduct contrary to public policy,"[11] should be limited to labor arbitrations, and that a *broader* "public policy exception" should apply to commercial arbitration awards. The Court of Appeals explained that this prior lower court statement applied only in situations where an award enforced an illegal contract, or compelled illegal contract performance, and did not extend to alleged misunderstandings or misapplications of rules of contract construction, and the Court of Appeals rejected Revere's argument for a broader "public policy exception" in commercial arbitration cases, stating:

> A looser standard in other settings would upset the basic goal sought by Congress in enacting the Federal Arbitration Act. Allowing undue challenges

[10] Revere attempted to squeeze its motion under the language of Section 10(d) of the Federal Arbitration Act, 9 U.S.C. § 10(d), by arguing that the arbitrators "exceeded their powers" by not applying *contra proferentem* when construing the contract (Petition at 14).

[11] Union Employers Div. of Printing Indus., Inc. v. Columbia Typographical Union No. 101, 353 F. Supp. 1348, 1349 (D.D.C. 1973), *aff'd w/o opinion*, 492 F.2d 669 (D.C. Cir. 1974).

> to arbitration awards would defeat the finality and speedy dispute resolution expected of the arbitration procedure (4a, fn. 1).

Thus, the Court of Appeals did not confuse the Labor Act and the Federal Arbitration Act; it merely stated that there was no basis under the Federal Arbitration Act for applying a broader "public policy exception" to the enforceability of commercial arbitration awards than that which had been suggested in a prior labor arbitration case. It is at least possible that there could be *wider* latitude for "public policy" considerations in the review of arbitration awards in labor cases, where the scope of review is not expressly limited by statute. However, that question is not presented in the instant petition. It was sufficient in this case for the Court of Appeals to conclude that the Federal Arbitration Act, which expressly delineates the sole grounds for nonenforceability of a commercial arbitration award, does not authorize a general "public policy" review of an arbitrator's construction of a contract.[12]

4. The Legal Issue Stated By Petitioner Is Not Fairly Presented In This Case.

Petitioner's statement of "Questions Presented" assumes that the arbitrators in fact violated the rule of *contra proferentem*. That is not the case. The arbitrators did not find the contract ambiguous, nor did either of the two lower courts. The District Court stated that "it is not at all clear that this rule of construction [*contra proferentem*] has been violated" (11a), and further stated that "Revere has failed to convince the Court

[12] It should be noted that neither the petitioner nor the respondent has discovered any federal court case, whether involving a labor arbitration or a commercial arbitration, which has in fact vacated an award on "public policy" grounds.

that any error has occurred" (11a). If a Writ of Certiorari were to be granted, a dispositive ruling could not be made in favor of the petitioner unless a finding were made that the arbitrators did misconstrue the contract. The process of making such a determination would require the Court to review the extensive evidence and arguments that were presented to the arbitrators relating to the pertinent contract interpretation issues and to consider not only the rule of *contra proferentem,* but also the applicability of various competing rules of contract construction. For example, acceptance of Revere's proferred construction of the contract would violate the rule that an insurance contract is to be construed so as to give effect to all of its provisions. 13 Appleman, *Insurance Law & Practice* § 7383, pp. 34-36 (1976). More importantly, it would violate the most fundamental principle of insurance law, the "principle of indemnity," which provides that "insurance is aimed at reimbursement, but not more" and, therefore, "insurance contracts shall be interpreted and enforced consistently with this objective of conferring a benefit no greater in value than the loss suffered." R. Keeton, *Basic Text on Insurance Law* at 88 (1971). The arbitrators in this case awarded Revere the maximum value of its insured loss and expressly stated that a larger award would permit Revere to recover an amount "in excess of the reasonable value of what Revere claims to have lost" (Award at 90a).

5. The Result In This Case Has No Effect On Other Parties Or Other Claims Under The OPIC Program.

The result of the arbitration in this case affects only Revere and OPIC. Arbitration awards do not have precedential effect. Moreover, the key contractual provi-

sions which were at issue in this case appear in different form in subsequent versions of the OPIC contract.

6. Petitioner's Other Arguments To Support Its Petition Are Invalid.

Revere argues that the importance of this case for Revere is measured by $62,999,856, and that its importance for OPIC is measured by its impact on the credibility of the OPIC insurance program and the perceived fairness of the arbitration process. The sum of money involved is not alone sufficient to make Revere's petition worthy of consideration—particularly where such amount would constitute a "windfall" recovery, over and above the maximum value of Revere's loss. Similarly, neither the credibility of the OPIC insurance program, nor the perceived fairness of arbitration, is adversely affected by an award that compensated Revere for the maximum amount of its insured loss, but denied a windfall recovery. Neither lower court found any reason to question either the fairness or the correctness of the award.

CONCLUSION

The writ should be denied.

Respectfully submitted,

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